

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WESTERN SURETY COMPANY, 08 Civ. 3478

Plaintiff, Judge Swain

-against- ANSWER WITH COUNTERCLAIM

PRIMARIS AIRLINES, INC.,

Defendant.
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Defendant, PRIMARIS AIRLINES, INC. ("Primaris Airlines") by and through their attorneys, Burkhart Wexler & Hirschberg, LLP, hereby submits this Answer to the Complaint with Affirmative Defenses and a Counterclaim and in support thereof, allege as follows:

1. Admits paragraphs 2, 4, 6, 7, 8, 9, 10 and 12.
2. Neither admits nor denies the allegations in paragraphs 3 and 5 as Defendant is without information sufficient to form a belief as to the allegations contained in the foregoing paragraphs.
3. Denies the allegations contained in paragraphs 11, and 13 through 21.

FIRST AFFIRMATIVE DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted against the Defendant.

SECOND AFFIRMATIVE DEFENSE

5. Plaintiff is barred and/or estopped from any recovery against the Defendant Primaris Airlines by virtue of its own misconduct, inequitable conduct, and unclean hands.

THIRD AFFIRMATIVE DEFENSE

6. Plaintiff's damages, if any, were not proximately caused by any conduct of the Defendant Primaris Airlines.

FOURTH AFFIRMATIVE DEFENSE

7. Plaintiff has not and will not sustain any actual damages as Defendant as posted a cash bond in the amount of \$100,000.00 and the theoretical and excess exposure of \$24,112.00 is non-existent as Defendant has tendered an offer of compromise to the United States Customs Service of \$25,000.00 thereby eliminating any exposure to plaintiff and further offered to Plaintiff to transfer an additional \$25,000.00 to Plaintiff to be held in escrow to hold Plaintiff fully harmless for any loss it may in fact sustain should the United States Customs Service rejects the offer of compromise.

AS AND FOR A COUNTERCLAIM

8. Plaintiff has not sustained and will not sustain any loss as a result of the claims asserted against Defendant and knows and/or should know such to be the case if it had in fact itself or through counsel made a professional and competent pre-filing inquiry before instituting this action. As a result, Defendant has and will incur consequential damages as a result of Plaintiff's bad faith non-performance of its insuring agreement in an amount exceeding \$25,000.00.

WHEREFORE, Defendant respectfully requests that judgment be entered in their favor as follows:

- A. Dismissing Plaintiff's claims for relief in their entirety with prejudice.
- B. On the first counterclaim, awarding Defendant damages against Plaintiff Western Surety Company in the amount of \$25,000.00 plus interest for its bad faith non-performance and/or breach of its insuring agreement with Defendant, Primaris Airlines;
- C. In the alternative to "B" above, awarding Defendant, Primaris Airlines, its costs and expenses, including reasonable attorney's fees in connection with these proceedings on the grounds they are frivolous; and
- D. Such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
June 4, 2008

Respectfully submitted,

BURKHART WEXLER & HIRSCHBERG, LLP

By: Norman B. Arnoff
Norman B. Arnoff, Esq.

Attorneys for Defendant
585 Stewart Ave., Suite 750
Garden City, New York 11530
(516) 222-2230

TO:

Law Offices of Michael P. O'Connor
Attorney for Plaintiff
10 Esquire Road, Suite 14
New City, New York 10956

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WESTERN SURETY COMPANY

Plaintiff,

08 Civ. 3478

-against-

PRIMARIS AIRLINES, INC.,

Defendant.
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STATE OF NEW YORK)
 : ss.:
COUNTY OF NASSAU)

BELINDA GANDOLFO being duly sworn, deposes and says:

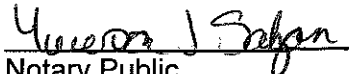
I am not a party to the action, am over 18 years of age and reside at Merrick, New York 11566.

On June 6, 2008, I served a true copy of the annexed **ANSWER WITH COUNTERCLAIM** by mailing same in a sealed envelope with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

Law Offices of Michael P. O'Connor
10 Esquire Road, Suite 14
New City, New York 10956


BELINDA GANDOLFO

Sworn to before me this
6 day of June 2008.


Notary Public

TERESA J. SALZAN
NOTARY PUBLIC, State of New York
No. 01SA6165813
Qualified in Suffolk County
Commission Expires May 21, 2011